

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	File No. EB-02-TC-105
)	
Marcus Cable Associates, LP)	CUID No. TN0036 (Newport)
)	
Complaint Regarding Cable Programming)	
Services Tier Rates and Petition for)	
Reconsideration)	

ORDER

Adopted: July 16, 2002

Released: July 17, 2002

By the Chief, Enforcement Bureau:¹

1. In this Order we consider complaints filed against the rates charged by the above-referenced operator ("Operator")² for its cable programming services tier ("CPST") in the community referenced above. The Cable Services Bureau has already issued an Order, DA 95-781,³ which resolved complaints filed against Operator's CPST rates in effect through May 14, 1994. In its Prior Order, the Cable Services Bureau stated that its findings "do not in any way prejudice the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations."⁴ Operator filed a refund plan in response to Order, DA 95-781, which was rejected by the Cable Services Bureau in Order, DA 97-2102⁵ ("Prior Order"). Operator filed a petition for reconsideration ("Petition") of the Prior Order along with amended refund plans. In this Order, we address Operator's refund plans as well as the reasonableness of Operator's CPST rates for the period beginning July 15, 1994.⁶

¹ Effective March 25, 2002, the Commission transferred responsibility for resolving cable programming services tier rate complaints from the former Cable Services Bureau to the Enforcement Bureau. *See Establishment of the Media Bureau, the Wireline Competition Bureau and the Consumer and Governmental Affairs Bureau, Reorganization of the International Bureau and Other Organizational Changes*, FCC 02-10, 17 FCC Rcd 4672 (2002).

² The term "Operator" includes Operator's successors and predecessors in interest.

³ *In the Matter of Sammons Communications, Inc.*, DA 95-781, 10 FCC Rcd 8278 (CSB 1995).

⁴ *Id.* at n. 1.

⁵ *In the Matter of Marcus Cable Associates, LP*, DA 97-2102, 13 FCC Rcd 7071 (CSB 1998).

⁶ The Commission's rules provide for a refund liability deferral period, if timely requested by the Operator, beginning May 15, 1994 and ending July 14, 1994, for any overcharges resulting from Operator's calculation of a new maximum permitted rate on its FCC Form 1200. *See* 47 C.F.R. § 76.922(b)(6)(ii). Operator elected to defer refund liability. However, Operator will incur refund liability from May 15, 1994 through July 14, 1994 for any CPST rates charged above the FCC Form 393 maximum permitted rate. Operator's Amended Refund Plan, which we review herein, includes this time period in its refund calculation for Order, DA 95-781.

2. Under the provisions of the Communications Act⁷ that were in effect at the time the referenced complaints were filed, the Federal Communications Commission ("Commission") is authorized to review the CPST rates of cable systems not subject to effective competition to ensure that rates charged are not unreasonable. The Cable Television Consumer Protection and Competition Act of 1992⁸ ("1992 Cable Act") required the Commission to review CPST rates upon the filing of a valid complaint by a subscriber or local franchising authority ("LFA"). The filing of a complete and timely complaint triggers an obligation upon the cable operator to file a justification of its CPST rates.⁹ The Operator has the burden of demonstrating that the CPST rates complained about are reasonable.¹⁰ If the Commission finds a rate to be unreasonable, it shall determine the correct rate and any refund liability.¹¹

3. Operators must use the FCC Form 1200 series to justify rates for the period beginning May 15, 1994.¹² Cable operators may file an FCC Form 1210 to justify quarterly rate increases based on the addition and deletion of channels, changes in certain external costs and inflation.¹³ Operators may justify their rates on an annual basis using FCC Form 1240 to reflect reasonably certain and quantifiable changes in external costs, inflation, and the number of regulated channels that are projected for the twelve months following the rate change.¹⁴ Any incurred cost that is not projected may be accrued with interest and added to rates at a later time.¹⁵

4. Upon review of Operator's FCC Form 1200, we accept Operator's calculated maximum permitted rate ("MPR") of \$8.05. Because Operator's actual CPST rate of \$9.46, effective July 15, 1994 through September 30, 1994, exceeds its calculated MPR of \$8.05, we find Operator's actual CPST rate of \$9.46, effective July 15, 1994 through September 30, 1994, to be unreasonable. Upon review of Operator's FCC Form 1210, covering the period April 1, 1994 through September 30, 1994, we accept Operator's calculated MPR of \$9.14. Because Operator's actual CPST rate of \$9.46, effective October 1, 1994 through May 31, 1996, exceeds its calculated MPR of \$9.14, we find Operator's actual CPST rate of \$9.46, effective October 1, 1994 through May 31, 1996, to be unreasonable. Upon review of Operator's FCC Form 1240, for the projected period June 1, 1996 through May 31, 1997, we find Operator's actual CPST rate of \$11.14, effective June 1, 1996, to be reasonable.¹⁶

5. In the Prior Order, the Cable Services Bureau rejected Operator's proposed refund plan filed in response to Order, DA 95-781. In its Petition, Operator argues that it should have been allowed to raise the issue of inter-tier offsets for the first time when it filed its initial refund plan. Because we reject Operator's

⁷ Communications Act, Section 623(c), *as amended*, 47 U.S.C. § 543(c) (1996).

⁸ Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁹ See Section 76.956 of the Commission's rules, 47 C.F.R. § 76.956.

¹⁰ *Id.*

¹¹ See Section 76.957 of the Commission's rules, 47 C.F.R. § 76.957.

¹² See Section 76.922 of the Commission's rules, 47 C.F.R. § 76.922.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Because Operator's refund liability for the period October 1, 1995 through May 31, 1996 was trued up in a subsequent FCC Form 1240, which we review herein, Operator is not required to separately calculate that refund liability and submit a refund plan for that time period.

request for offsets on substantive grounds, we find the procedural argument to be moot and decline to address it. In its Petition, Operator also argues that it should be permitted to offset its past CPST overcharges with its past basic service tier ("BST") undercharges. The Commission has addressed the issue of inter-tier offsets in *Cencom Cable Income Partners* ("Cencom").¹⁷ In *Cencom*, the Commission determined that such inter-tier offsets are "inconsistent with the Commission's conclusion in the [Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking]"¹⁸ that cable operators should not balance low BST rates with CPST rates that exceed the maximum permitted rate for the tier."¹⁹ Therefore, we will not allow Operator to offset its CPST overcharges with its BST undercharges and we deny Operator's Petition.

6. Operator filed two amended refund plans with its Petition. For the reasons stated above, we reject the refund plan submitted by Operator that includes inter-tier offsets. Upon review of Operator's refund plan that does not include inter-tier offsets ("Amended Refund Plan"),²⁰ we find the refund plan to be acceptable provided Operator's amends the refund plan to include interest to the date of payment of refunds.

7. Accordingly, IT IS ORDERED, pursuant to Sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111 and 0.311, that the CPST rate of \$9.46, charged by Operator in the community referenced above, effective July 15, 1994 through March 31, 1996, IS UNREASONABLE.

8. IT IS FURTHER ORDERED, pursuant to Sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111 and 0.311, that the CPST rate of \$11.14, charged by Operator in the community referenced above, effective June 1, 1996, IS REASONABLE.

9. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the community referenced above that portion of the amount paid in excess of the maximum permitted CPST rate of \$8.05 per month (plus franchise fees), plus interest to the date of the refund, for the period July 15, 1994, through September 30, 1995.

10. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPST subscribers for the stated periods, and shall within 30 days of the release of this Order, file a report with the Chief, Enforcement Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

11. IT IS FURTHER ORDERED, pursuant to Sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111 and 0.311, that the complaints referenced herein against the CPST rates charged by Operator in the community referenced above ARE GRANTED.

12. IT IS FURTHER ORDERED, pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the petition for reconsideration filed by Operator is DENIED.

¹⁷ See *In the Matter of Cencom Cable Income Partners II, L.P.*, 12 FCC Rcd 7948 (1997).

¹⁸ 8 FCC Rcd 5631 (1993).

¹⁹ *Cencom* at ¶22 (footnote omitted).

²⁰ Operator calculated a total refund liability of \$7,974.00.

13. IT IS FURTHER ORDERED, that Operator's Amended Refund Plan IS APPROVED provided operator modifies its Amended Refund Plan to the extent indicated herein, and IT IS FURTHER ORDERED, pursuant to Section 76.962 of the Commission's rules, 47 C.F.R. § 76.962, that Operator implement its Amended Refund Plan within 60 days of the release of this Order.

14. IT IS FURTHER ORDERED, pursuant to Section 76.962 of the Commission's rules, 47 C.F.R. § 76.962, that Operator shall file a certificate of compliance with the Chief, Enforcement Bureau, within 90 days of the release of this Order certifying its compliance with this Order.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau